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A.M.

Date: 3-27-90

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE

SOUTHERN DISTRICT OF GEORGIA

Savannah Division

IN RE:)	Chapter 7 Case
)	Number <u>85-40555</u>
DIAMOND MANUFACTURING)	
COMPANY, INC.)	
Debtor)	
)	
DONALD E. AUSTIN)	Chapter 11 Case
)	Number <u>85-40639</u>
Debtor-in-Possession)	
)	
ROSE MARINE, INC.)	Chapter 7 Case
)	Number <u>86-40143</u>
Debtor)	

ORDER

On April 20, 1987, the Honorable Herman W. Coolidge, former judge of this court, entered an order awarding B.V.A. Credit Corporation, now known as Signet Commercial Credit Corporation (hereinafter referred to as "Signet") monthly adequate protection payments from the debtors-in-possession in their respective Chapter 11 cases pending in this court. The court found Signet's adequate protection in the debtor's equipment to be short-lived and ordered the debtors-in-possession to pay Signet Thirty-Two Thousand and No/100 (\$32,000.00) Dollars per month for six (6) months and to sell unneeded equipment and reduce the debt

owed Signet by Twenty-Seven (27%) percent by December 31, 1987.

If the debtors failed to comply

with the order, the court held that upon the submission of an affidavit by Signet stating the noncompliance, the court would grant, without further hearing, relief from stay to allow Signet to foreclose on two parcels of real property owned by the debtors and known as the Hutchinson Island tract and the I-95/204 tract. The debtors filed motions to have this court reconsider its rulings on the adequate protection issue, and by order of May 8, 1987, the court denied their request. The debtors-in-possession appealed the order to the District Court alleging 15 errors that warranted reversal of the order. The debtor then made four payments to Signet under the order while the appeal was pending, but failed to make the final two (2) payments.

On August 26, 1988, this court converted the Chapter 11 cases of Diamond Manufacturing Co., Inc. (hereinafter referred to as "Diamond") and Rose Marine, Inc. (hereinafter referred to as "Rose Marine") to cases under Chapter 7 of the Bankruptcy Code. The case of debtor-in-possession, Donald E. Austin, was not converted, but remained a case under Chapter 11 of the Bankruptcy Code.

On July 28, 1989, the District Court issued an order requiring the parties to redefine the issues on appeal from the order of this court dated April 20, 1987. The District Court in

its order raised the issue of whether the appeal had become moot by subsequent events in the case. In their response to the order, Signet maintained that since the I-95/204 tract had been sold, the cases of Diamond and Rose Marine converted to cases under Chapter 7 of the Bankruptcy Code, and it had been permitted an opportunity to market the Hutchinson Island tract, the order of April 20, 1987 had become moot. The debtors maintained that the issues on appeal had not become moot, but that the order of April 20, 1987 needed to be reconsidered by this court in view of the subsequent events that had occurred. The debtors also contended that the order needed to be reconsidered in light of the ruling of the United States Supreme Court on postpetition interest and attorney's fees in the case of United Savings Association of Texas v. Timbers of Inwood Forest Associates Ltd., 484 U.S. 365, 108 S.Ct. 626, 98 L.E.2d 740 (1988).

By order of September 29, 1989, the District court remanded the appeal of the April 20, 1987 order to this court for evaluation of the order in view of the subsequent events that have occurred in those proceedings. The parties were afforded an opportunity to brief their positions to this court, and after careful consideration of those briefs, this court concludes that the alleged errors contained in the April 20, 1987 order have been rendered moot by subsequent events in the debtor's proceedings. The Chapter 11 cases of Diamond and Rose Marine have

been converted to cases under Chapter 7. All property of these estates is now in the hands of a Chapter 7 trustee. The I-95/204 tract of real property has been sold, and Signet has received the proceeds from that sale. The debtor-in-possession, Donald E. Austin, in a lengthy

thirty (30) page response to the remand recites a story of alleged fraud and deceit on the part of Signet and requests that the cases of debtors, Diamond and Rose Marine, be returned to a Chapter 11 proceeding. The debtor outlines with a great deal of detail his allegations of fraud and deceit. However, the order under consideration is not the order converting the cases, but the order awarding Signet adequate protection payments and setting out the conditions under which it would be granted relief from stay. Subsequent developments such as the sale of the I-95/204 property and the order of this court valuing the Hutchinson Island property at Two Million Two Hundred Forty-Seven Thousand and No/100 (\$2,247,000.00) Dollars have rendered moot the issue of relief from stay set out in the April 20, 1987 order. Signet has filed claims against each of these debtors which exceeds the amount of the sale proceeds of the I-95/204 tract and the adequate protection payments made by the debtors under the order of April 20, 1987.¹ While these proofs of claim may include postpetition

¹Signet filed a proof of claim on November 23, 1988 against Diamond for Four Million Four Hundred Eighty-Five Thousand Three Hundred Twenty-Five and 95/100 (\$4,485,325.95) Dollars. Signet's

interest to which Signet may not be entitled, the debtors have not filed an objection to the

proof of claim against Rose Marine is the same amount as the claim against Diamond. Signet's proof of claim against Austin filed on December 21, 1987, is for the sum of Five Million Three Hundred Eighteen Thousand Nine Hundred Five and 17/100 (\$5,318,905.17) Dollars.

claims of Signet in each of these cases which has been resolved by this court. In order to determine whether Signet would be entitled to postpetition interest, the value of their collateral in each case must be determined.² United Savings Association of Texas, supra. If Signet is an oversecured creditor, then Signet would be entitled to postpetition interest. Id.; 11 U.S.C. §506. If Signet is an undersecured creditor, i.e. the value of its collateral is less than the amount owed by the debtor, then it is not entitled to recover any postpetition interest. Id. Signet would only hold a secured claim to the extent of the value of its collateral. 11 U.S.C. §506(a). The balance of any sum owed which is greater than the value of its collateral would be an unsecured claim. Id. However, as no objection to the proof of claim has been filed, the claims of

Signet in each of these cases is deemed allowed until an objection is filed. 11 U.S.C. §502(a). These claims exceed all sums which Signet has received from these three debtors, and the claims were filed as secured claims.

Additionally, the appropriate time to determine whether Signet holds a fully secured claim, an oversecured claim, or an undersecured claim, would be after the liquidation of all assets of

²Bankruptcy Rule 3012 allows the court to "determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct."

Diamond and Rose Marine. The appropriate time to determine whether Signet was entitled to an award of adequate protection would be after the liquidation of the assets of Diamond and Rose Marine. "[T]he amount of the creditor's claim which is a secured claim in accordance with section 506(a) may be lower at the end of the case, when treatment of such claim may be at issue, than the amount of such claim that constituted a secured claim at the commencement of the case." 3 Collier on Bankruptcy ¶506.04 (L. King 15th ed. 1989). An award of adequate protection is designed to avoid such a reduction in the creditor's secured claim. If the court's award of adequate protection is subsequently determined to have been inadequate, the creditor is entitled to a superpriority administrative expense claim to compensate the creditor for the reduction in the value of its collateral. 11 U.S.C. §507(b). Whether such a reduction in the value of the collateral in which Signet holds an interest has occurred cannot be determined until the collateral has been fully liquidated. The treatment of the adequate protection payments made by the debtors can be determined at that time if Signet is determined to have been an undersecured creditor.

Austin also contends that Signet's claims should be subordinated to the claims of all other creditors and Signet ordered to return all money it has received from the debtors. Such a contention must be brought in the form of an adversary proceeding. See Bankruptcy Rule 7001. However, those bare

allegations are not

a basis to reconsider the order of April 29, 1987. The court recognizes that Signet's claim for postpetition interest must be addressed in view of the Timbers decision, but such a consideration is best addressed after the liquidation of the estates of Diamond and Rose Marine. A determination of the secured status of Signet's claim can be made at that time.

For the above reasons, it is hereby ORDERED that as the order of April 20, 1987 has been rendered moot by subsequent events, it shall not be modified.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 27th day of March, 1990.